

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs February 14, 2006

CHARLES CLAYTON FORD, JR. v. VALERIE DENISE FORD

Appeal from the Circuit Court for Knox County
No. 95665 Jerry Scott, Senior Judge

No. E2005-01772-COA-R3-CV - FILED MARCH 30, 2006

This is a divorce case. The trial court granted Charles Clayton Ford, Jr. (“Husband”) a divorce from Valerie Denise Ford (“Wife”) and awarded him primary physical custody of the parties’ two minor children. Wife was ordered to pay prospective child support. According to Husband, the children had been in his custody since the parties’ separation, almost a year and a half prior to the entry of the judgment of divorce. Despite this, the trial court failed to award any retroactive support. Husband appeals, contending that the trial court erred in failing to order retroactive child support or to file written findings as to why such support was not ordered. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

David C. Lee, Knoxville, Tennessee, for the appellant, Charles Clayton Ford, Jr.

No appearance on behalf of Valerie Denise Ford.

OPINION

I.

The parties were married in 1998. Two children were born to their union: Samantha Inze Burnice Ford (DOB: March 13, 2000) and Jonathon Allen Ford (DOB: January 7, 2003). The parties separated in October, 2003, and Husband filed a complaint for divorce in November of that year. Husband’s complaint averred that the best interest of the parties’ children would be served by designating him as the children’s primary residential parent.

On March 8, 2004, Husband was awarded exclusive custody of the children. The trial court stated that, until further order of the court, Wife was enjoined from having any contact with Husband and/or the parties' children. One year later, on March 21, 2005, the trial court entered a judgment of divorce. The trial court held that Husband was entitled to primary physical custody of the children. Wife was ordered to pay child support in the amount of \$162.00 every two weeks beginning March 25, 2005. The trial court also stated that "there is to be no award for [b]ack [c]hild [s]upport." It did not further elaborate and did not make written findings on the subject. In April, 2005, Husband filed this appeal, specifically seeking "back payment of child support from [Wife] from the time of separation through March 21, 2005."

II.

Our review of this non-jury case is *de novo*; however, the record comes to us with a presumption of correctness as to the trial court's factual findings, a presumption we must honor unless the evidence preponderates against those findings. Tenn. R. App. P. 13(d); **Bogan v. Bogan**, 60 S.W.3d 721, 727 (Tenn. 2001). No presumption of correctness attaches to the trial court's conclusions of law. **Jahn v. Jahn**, 932 S.W.2d 939, 941 (Tenn. Ct. App. 1996).

III.

The pertinent code provisions and the Child Support Guidelines make it clear that, in cases where an initial child support obligation is set, there is a presumption that the non-custodial parent "must" pay retroactive support.¹ Any deviation from this presumption must be supported by written findings of fact and conclusions of law, including a written finding that retroactive support would be unjust and inappropriate and that the best interest of the children would be served by not ordering such support. See Tenn. Code Ann. § 36-5-101(e)(1)(A), (D), (F); Tenn. Comp. R. & Regs. ch. 1240-2-4-.06(2). In the instant case, the trial court did not order retroactive support; it also failed to make written findings justifying its failure to order such support. Nonetheless, we do not believe the trial court's error is reversible in nature.

The Rules of Appellate Procedure provide that we are not required to grant relief with respect to an error of the trial court if the complaining party "failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error." Tenn. R. App. P. 36(a). The record before us is completely devoid of any indication that Husband called to the attention of the trial court that it had failed to follow the statutory and regulatory provisions regarding retroactive support. When a trial court makes an error of the type presented in this case, an aggrieved party cannot remain silent, "tuck" the error away in the party's hip pocket, and then use it on appeal to his or her advantage. The timely calling of an error to the attention of the trial court, in many cases, will render an appeal unnecessary. That is the whole purpose behind Tenn. R. App. P. 36(a).

¹ See Tenn. Comp. R. & Regs. ch. 1240-2-4-.06(1), (2) (2005); see also Tenn. Code Ann. § 36-5-101(e)(1)(C)-(F) (2005).

Husband argues that our recent decision in *Miller v. Kelk*, No. E2003-02180-COA-R3-JV, 2005 WL 1669849 (Tenn. Ct. App., E.S., filed July 18, 2005) supports his position in this case. We disagree. In *Miller*, under somewhat similar facts, we concluded that the trial court erred when it failed to order retroactive support or make written findings as to why the non-custodial parent was relieved of paying retroactive support. *Id.*, at *5-*6. However, unlike in the instant case, the custodial parent in *Miller* attempted to bring the trial court's attention to the court's error by filing a motion to alter or amend after retroactive support was not ordered. *Id.*, at *1. Since Husband in the instant case did not take any remedial action, we elect to exercise the discretionary authority granted to us by Tenn. R. App. P. 36(a). Accordingly, we refuse to grant Husband relief with respect to the trial court's error.

IV.

The judgment of the trial court is affirmed. This case is remanded to the trial court for enforcement of the trial court's judgment and for the collection of costs assessed below, all pursuant to applicable law. Costs on appeal are taxed to the appellant, Charles Clayton Ford, Jr.

CHARLES D. SUSANO, JR., JUDGE